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No. 81-2359

IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; BELL TELEPHONE LABORATORIES, INCORPORATED,

Petitioners,

vs.

PHONETELE, INC.,

Respondent.

On Appeal from the United States District Court for the Central District of California.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS

Page

Introductory Statement 1

Procedural Maturity of the Case Below 4

Argument 5

I.

Petitioners Have Misled This Court by Suggesting They Had Been Placed in an Insoluble Dilemma by the Carterfone Decision 5

II.

There Is No Inconsistency Between Public Interest Standards Applied by the FCC and Antitrust Standards 8

III.

There Is No Pervasive Regulation Which Could Possibly Give Rise to an Implied Immunity 12

IV.

The Core of the Relevant Inquiry Must Center Upon Legislative Intent 13

V.

The Decision Below Is Correct and No Writ Should Issue 14

Conclusion 17

TABLE OF AUTHORITIES

Cases	Page
California v. FPC, 369 U.S. 482 (1962)	8, 14
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)	9, 10
Carnation v. Pacific Westbound Coal, 383 U.S. 213 (1966)	14
Carter v. AT&T, 365 F.2d 486 (5th Cir. 1966)	17
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)	14
Community Communications Co. v. Boulder, Colo., 50 USLW 4144 (January 13, 1982)	14
Essential Communications Systems, Inc. v. AT&T, 610 F.2d 1114 (3rd Cir. 1979)	2
Gordon v. New York Stock Exchange, 422 U.S. 659 (1974)	10, 11, 13
Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 202 (1979)	15
Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974)	11
Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. 1956)	7
Industrial Communications Systems, Inc. v. Pacific Tel. and Tel. Co., 505 F.2d 913 (9th Cir. 1975)	2
Mid-Texas Communications Systems, Inc. v. AT&T, 615 F.2d 1372 (5th Cir. 1980)	1, 2
Morton v. Mancari, 417 U.S. 540 (1974)	14
National Gerimedical Hospital v. Blue Cross, 452 U.S. 378 (1980)	13
New York State Chiropractic Ass'n v. Pireno, 50 USLW 4911 (June 28, 1982)	14
North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1977), cert. denied 434 U.S. 874 (1977)	4, 5, 6

Page

Northeastern Telephone Company v. AT&T, 651 F.2d 76 (2d Cir. 1981) 2, 12

Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) 11

Ottertail Power Company v. United States, 410 U.S. 366 (1973) 8, 16

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) 10

Phonetele, Inc. v. AT&T, 664 F.2d 716 (9th Cir. 1981) 5, 7

Phontele, Inc. v. Public Util. Comm'n, 11 Cal.3d 125 (1974) 7

Radsanower v. Touche Ross & Co., 426 U.S. 151 (1976) 14

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 3

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 8, 9, 12, 13

Sound, Inc. v. AT&T, 631 F.2d 1324 (8th Cir. 1980) 1, 11

United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1974) 10, 11, 13

United States v. RCA, 358 U.S. 334 (1959) .. 8, 11, 16

Statutes

§19(b)(9), Securities Exchange Act 11

§22(f), Securities Exchange Act 11

47 U.S.C. §§151, 201 8

§411, Federal Aviation Act 10

§221(a), Communications Act 14

Agency Decisions

Page

AT&T (Dataphone), In re (Docket No. 20288), 63 FCC 2d 774 (1977) 9

Carterfone, 13 FCC 2d 420, 14 FCC 2d 149 (1968), 14 FCC 2d 571 (1968), 15 FCC 2d 605 (1968) 5, 6, 7, 8, 15, 16, 17

Customer Interconnection (Docket 20003), 61 FCC 2d 766 (1976) 10

Interstate and Foreign MTS and WATS (Docket No 19528), 35 FCC 2d 539 (1972), 53 FCC 2d 219 (1975), 56 FCC 2d 593 (1975), 58 FCC 2d 736 (1976), 59 FCC 2d 83 (1976), 64 FCC 2d 1039 (1977) 4, 8

Interstate and Foreign MTS and WATS (Docket No. 20288), 57 FCC 2d 1216, 1229 (1976) 6, 9, 10

Jordaphone Corp. v. AT&T et al., 18 FCC 644 (1954) 6

Primary Instrument Concept, 68 FCC 2d 1157, 1163-1164 (1978) 10, 17

Recording Devices, In The Matter of, 11 FCC 1033 (1947) 6

Treatises, Articles, and Other

1 Areeda, P. and D. Turner, Antitrust Law, Sec. 224 (1978) 12

Microelectronics, Vol. 27, No. 3, p. 63 (Sept. 1977) 17

Structure and Performance of the U.S. Communications Industry, Borchardt (Division of Research Graduate School of Business Administration, Harvard University, Boston, 1970), p. 3 17

FCC amicus curiae brief in United States v. AT&T, 62 FCC 2d 1102 (1975) 2, 3, 4, 16, 18

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Petitioners,

vs.

PHONETELE, INC.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introductory Statement.

The instant petition requests this Court to review an issue of law which is now well settled. Indeed, to find a more settled issue would be difficult.

Four circuits have already squarely ruled against the Petitioners on precisely the same issue. These circuit court cases involve facts which are indistinguishable from the instant case. Therefore, there is no reason for this Court to invoke its jurisdiction on the question of implied immunity of the Bell System from the antitrust laws.[1] See *Sound, Inc. v. AT&T*, 631 F.2d 1324 (8th Cir. 1980); *Mid-Texas Communications Systems, Inc. v. AT&T*, 615 F.2d 1372 (5th

[1]As used herein, the Bell System means the three named defendants as well as the 23 operating companies (wholly or partly owned by AT&T), named in the complaint as unnamed co-conspirators. Defendant Western Electric is wholly-owned by AT&T. Western Electric and AT&T each own one-half of defendant Bell Laboratories.

Cir. 1980), cert. den. 449 U.S. 912 (1980); *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114 (3rd Cir. 1979); *Northeastern Telephone Company v. AT&T*, 651 F.2d 76 (2d Cir. 1981).

Though the question may be an important one to Petitioners, it has already been decided in an harmonious fashion. Respondent suggests that the District of Columbia Circuit, where the Government's case of *United States v. AT&T*, ("Government's case") has been pending would also be in agreement with the 2nd, 3rd, and 5th and 8th Circuit cases, cited above, holding no implied immunity. Counting the 9th Circuit and the District of Columbia Circuit, six circuits are in agreement and no circuits are to the contrary. Even before the instant case, the 9th Circuit had already settled the implied immunity issue against Petitioners. *Industrial Communications Systems, Inc. v. Pacific Tel. and Tel. Co.*, 505 F.2d 913 (9th Cir. 1975). Moreover, all Circuit Court judges have voted in favor of no implied immunity; none of the cases have a dissent by a Circuit Court judge.[2]

The opinion in the instant case is a quality-crafted one authored by Circuit Judge Kennedy. On page ii of their Petition, the Petitioners frame their question of Judge Kennedy's opinion in a misleading and unacceptable fashion. Specifically, in Petitioners' formulation, jurisdiction is assisted over them "soley as pervasively regulated common carriers". This wording is patently incorrect in several respects. First, two of the named defendants, Western Electric Company and Bell Telephone Laboratories are not regulated common carriers at all. These two companies are merely

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[2]In the instant case, there was a dissent by the District Court judge sitting by designation.

unregulated co-conspirators, one a manufacturer, the other, a product development company. (See pp. 14-15, *infra*.)

Moreover, as framed by the Petitioners, the self-characterization as "pervasively" regulated common carriers is untrue. Cases by this Court hold that implied immunities have been denied both in the energy and banking industries, where far more regulation is exercised than over either telephone terminal equipment or the defendants, themselves. All of the Circuit Court decisions cited above have specifically rejected the pervasiveness contention, finding that although some regulation takes place as to part of the affiliated corporate components of the Bell System, it is simply not pervasively regulated.

Finally, as the Petitioners have framed the question, they posit that the Communications Act "prescribes a public interest standard governing the challenged conduct inconsistent with that of the antitrust laws." Again, contrary to such assertions, all of the above Circuit cases found that there is no inconsistency between the Communications Act standard and that of the antitrust laws. Also, the publicly stated position of the Federal Communications Commission ("FCC") is that there is no inconsistency between the two standards (See the FCC's *amicus curiae* brief filed in the Government's case, *United States v. AT&T*, appearing at 62 FCC 2d 1102 (1975). In its *amicus curiae* brief, the FCC stated, "The Commission has never considered its authority over equipment interconnection to displace the antitrust laws." 62 FCC 2d at 1114. An agency's construction of its legislation is entitled to deference. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). There should, accordingly, be no immunity in the instant case.

Procedural Maturity of the Case Below.

The instant case was before the 9th Circuit (as well as the District Court) in an entirely matured posture. The primary jurisdiction of the FCC had already been exhausted by way of extensive FCC consideration of the primary jurisdiction issues in years past. *Interstate and Foreign MTS and WATS*, (Docket No. 19528), 35 FCC 2d 539 (1972), 53 FCC 2d 219 (1975), 56 FCC 2d 593 (1975), 58 FCC 2d 736 (1976), 59 FCC 2d 83 (1976), 64 FCC 2d 1039 (1977), aff'd sub nom. *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977). See also the FCC's discussion of primary jurisdiction in its *amicus curiae* brief, *supra*, 62 FCC 2d at 1118-1119.

In short, only the antitrust issues remain and there is no sound reason why the Bell System should enjoy any implied immunity from antitrust jurisdiction. Most of the arguments advanced by Petitioners are either primary jurisdiction arguments, no longer valid in the procedural setting of the instant case, or are arguments on the merits, inapplicable at this pretrial stage of the proceeding. On July 19, 1982 the Honorable Malcolm M. Lucas denied Petitioners' motion for a stay of the proceedings in the District Court. Discovery is now going forward.

ARGUMENT.

I.

Petitioners Have Misled This Court by Suggesting They Had Been Placed in an Insoluble Dilemma by the *Carterfone* Decision.

The pervading theme of the Petition is that Petitioners were placed in an untenable position with the introduction of terminal equipment competition, generally referred to as "customer-provided equipment". (Petition at pp. 9-13, particularly pp. 9-10) The Court should reject these arguments out of hand. At best these arguments might go to the merits of the antitrust claim, but they are irrelevant for purposes of the implied immunity issue. See *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 740 (9th Cir. 1981).

The Petitioners' "Statement of the Case" suggests the Bell System was placed in an untenable dilemma by the FCC's asserted change of policy in *Carterfone*.[3] Like most yarns, this may bear a thread of truth but does not lend any weight to the overall preposterous argument of the Petitioners. The element of truth is that there the FCC's position favoring more liberalized interconnection squarely challenged the long-held monopoly enjoyed by the Bell System over telephone terminal equipment. This *"preservation of the carriers' private law-making authority over independent manufacturers"* was expressly recognized as the Petitioners' goal to be achieved in *North Carolina Utilities Comm'n v. FCC, supra*, 552 F.2d at 1051. (Emphasis is the Court's) This decision, generally referred to as "North Carolina II", ended the Bell System's long and relentless challenge to the FCC's registration program. (See, for example, 57 FCC 2d

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[3]*Carterfone* is fully cited, 13 FCC 2d 420, 14 FCC 2d 149 (1968), reconsideration denied, 14 FCC 2d 571 (1968), 15 FCC 2d 605 (1968).

at 1218 where the FCC commented on the Bell System's dilatory tactics.) Though the Petition fails to disclose the finding to the Court, in these hearings the FCC found the Bell System's post *Carterfone* interconnection tariffs "unlawfully discriminatory" and "unlawfully restrictive." (see 58 FCC 2d at 746). North Carolina II affirmed this specific finding on appeal by noting that the tariffs "are themselves unlawful." 552 F.2d at 1056. This tariff, already found unlawful, is part of the anticompetitive background of Phonetele's complaint.

The Petitioners fail to relate that they had many years to prepare for the more liberalized interconnection prior to *Carterfone*. Indeed, the FCC had given significant early indications long before *Carterfone* that a more liberalized interconnection policy would evolve. For example, in 1947, in the case titled *In The Matter of Recording Devices*, 11 FCC 1033 (1947), the Commission unambiguously concluded in part that,

> Insofar as any tariff regulations now on file with this Commission have the effect of barring the use of recording devices . . . such tariff regulations are unjust and unreasonable, and, therefore, unlawful under the provisions of section 201 of the Communications Act. 11 FCC at 1055-1056.

Seven years later in regards to another type of customer-provided equipment, automatic answering devices, the Commission took a similar and even stronger position in the case of *Jordaphone Corp. v. AT&T et al.*, 18 FCC 644 (1954). In *Jordaphone*, the FCC again concluded that foreign attachment provisions in the Bell System's tariffs were "unjust, unreasonable, and therefore unlawful . . ." 18 FCC at 671. Finally, in 1956, a very insignificant case was before the Commission regarding the Hush-A-Phone device.

The Commission at first found that the Hush-A-Phone device, which was a cup-like device to improve the privacy of telephone conversations, impaired telephone service. The Court of Appeals for the District of Columbia reversed. *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. 1956). On remand, the Commission ordered AT&T to file revised tariff schedules,

> . . . rescinding and cancelling any tariff regulations to the extent that they prohibit a customer from using, in connecting with interstate or foreign exchange service, the Hush-A-Phone device *or any other device* which does not injure defendants' [the Bell System's] employees, facilities, the public in its use of defendants' services, or impair the operation of the telephone system. *Hush-A-Phone*, 22 FCC 112, 114 (1957), on remand; [emphasis and brackets added].

Therefore, the suggestion — indeed primary argument — of the Petitioners that *Carterfone* somehow caught them by surprise and placed them in an untenable dilemma, is patently ridiculous in view of FCC decisions over the 21 years predating *Carterfone*. The handwriting was "on the wall." This point was correctly relied upon by the 9th Circuit in its opinion below. (See *Phonetele, Inc. v. AT&T et al., supra* at 664 F.2d 716, 730, particularly footnotes 36 and 38.) The professed Bell System dilemma is a sham.

In truth, the only dilemma the Bell System has faced is how to circumvent for over 35 years the FCC's directives and adverse court cases for more liberalized interconnection and, at the same time, avoid antitrust jurisdiction. (See, for example *Phonetele, Inc. v. Public Util. Comm'n*, 11 Cal.3d 125 (1974).) The Bell System's conduct in avoiding more liberalized interconnection of customer-provided equipment is nothing less than a sweeping, fraudulent and monopolistic course of conduct. Petitioners' argument as to the merits

have no standing in this Court's consideration of jurisdiction.

The Bell System has basically been trapped by its own tired position that they have the responsibility for "end-to-end service." The Bell System to this very day, still continues to espouse the "end-to-end service" as their own concept of the public interest. In 1978, the contention was rejected once again by the FCC in explicit and pertinent language which could leave no doubt,

> The contention that one telephone set is an integral part of basic service is essentially, in our view, merely another form of the oft-rejected argument that the telephone company must have one complete end-to-end service responsibility. We expressly rejected this end-to-end responsibility argument in *Carterfone*. (13 FCC 2d at 422) and again in the *Second Report in Docket No. 19528* (58 FCC 2d at 739-740).

II.

There Is No Inconsistency Between Public Interest Standards Applied by the FCC and Antitrust Standards.

By law, the FCC applies a "public interest" regulatory standard. (47 U.S.C. §§151, 201) Several important decisions of this Court have squarely held that a public interest standard is not incompatible with antitrust jurisdiction. *United States v. RCA*, 358 U.S. 334 (1959), involving Title III of the Communications Act; *California v. FPC*, 369 U.S. 482 (1962); *Ottertail Power Company v. United States*, 410 U.S. 366, 373 (1973).

The proper test for reconciling a regulatory to an antitrust statutory scheme was set out in 1963 in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). In *Silver*, this Court held an immunity would be implied ". . . only if necessary to make [the regulatory scheme] work, and even then only

to the minimum extent necessary." 373 U.S. at 355-356 (brackets added). In *Silver*, this Court articulated that the proper showing required was that of a necessary and complete ouster compelled by the incompatibility between the two schemes. There must be a "irreconcilable conflict" between the two schemes. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-597 (1976) rejected the Bell System position in 1976. In *Cantor*, the Court remarked,

> *Amicus curiae* forcefully contend that the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the 'public interest' standard widely enforced by regulatory agencies . . . .[4] *Cantor* at 595.

In *Cantor*, this Court found against the *Amicus curiae* position and found no implied immunity. The critical language stated:

> On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy. *Cantor* at pp. 595-596.

In 1976, the FCC articulated the doctrine of "full and fair competition" for the telephone terminal equipment market. *Interstate and Foreign MTS and WATS*, (Docket No. 20288), 57 FCC 2d 1216, 1229 (1976); see also *In re AT&T (Dataphone)*, (Docket No. 20288), 63 FCC 2d 774, 798 (1977). The FCC has recognized the terminal equipment market is not a natural monopoly market as is the market

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[4]In *Cantor*, the "amicus curiae" was the Bell System.

for basic telephone service. In *Customer Interconnection* (Docket 20003), 61 FCC 2d 766, 867 (1976), the FCC stated, ". . . we find no evidence . . . that there is a natural monopoly in the provision of terminal equipment . . ." See also *Primary Instrument Concept*, 68 FCC 2d 1157, 1163-1164 (1978). At the same period of time, the Commission noted:

> The Commission is confronted here with the difficult task of assuring that the benefits of full and fair competition will flow to the public, while minimizing to the greatest extent possible the intrusion of bureaucracy into the marketplace. *Interstate Foreign MTS and WATS*, (Docket No. 20288), 57 FCC 2d 1216, 1229 (1976).

The FCC has been moving for years to full and fair competition in the telephone terminal equipment market. This has resulted in the customer being given a free choice to choose his equipment from among many available suppliers. At the same time, the Commission has minimized to the greatest extent possible the intrusion of its regulation into this marketplace. To the extent regulation exists in the registration program, the law is that regulated industries are not *per se* exempt from antitrust jurisdiction. *Gordon v. New York Stock Exchange*, 422 U.S. 659, 688-689 (1974); *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 719-720 (1974); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596-597 (1976), particularly note 36.

When the FCC applies its public interest standard, it is charged with a far different statutory grant than was found in a case like *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). In *Pan American*, this Court found an immunity based, in part, upon the regulatory jurisdiction under §411 of the Federal Aviation Act which granted specific antitrust jurisdiction (*e.g.*, "unfair methods

of competition"). Such jurisdiction is not conferred to the FCC by the Communications Act under which respondents are regulated. *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959). The two principal cases relied upon by Petitioners also found an immunity, based in part, on express statutory grants that necessarily required the Securities and Exchange Commission to approve conduct otherwise violative of the antitrust laws. *United States v. National Ass'n of Securities Dealers, supra*, at 727-728 discussing §22(f) of the Securities Exchange Act; *Gordon v. New York Stock Exchange*, at 689 discussing §19(b)(9) of the Securities Exchange Act.

In the exercise of the FCC's jurisdiction, the law is well established that competition is one of the components of the FCC's public interest standard. *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) In the telephone terminal equipment area, the FCC, as pointed out above, has clearly indicated a conscious, expressed desire to pronounce, in its sound judgment, that the public interest requires full and fair competition in this non-natural monopoly market for customer-provided equipment.

At this same time, the Sherman Act was designed to be the comprehensive "charter of economic liberty" aimed at preserving competition. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Even if there were some differences in the public interest standard applied by the FCC, and the competition standard applied by antitrust courts, there can be no difference that approaches the type of irreconcilable difference that would require an ouster of the antitrust laws. If anything, the similar policies to be achieved complement each other.

> . . . the maintenance of an antitrust suit will not conflict with the operation of the regulatory scheme authorized

by Congress but will supplement that scheme. *Sound, Inc. v. AT&T, supra*, at 1330.

No Circuit has yet agreed with Petitioners that any inconsistency exists in this precise area of statutory balancing. Each of the five Circuit Courts holding that antitrust jurisdiction over Petitioners is proper has applied the law as it is required to do. That is, these courts have endeavored to accommodate the simultaneous working of the regulatory scheme with the antitrust laws. See *Silver v. New York Stock Exchange, supra*. The result has not been to Petitioners' liking.

III.

There Is No Pervasive Regulation Which Could Possibly Give Rise to an Implied Immunity.

The remaining principal thrust of the Petition is on the ground of "pervasive" regulation. Recently, the 2d Circuit Court of Appeals correctly remarked as to the Bell System's pervasive regulation argument that it is a "vague ground". The Court continued, "The pervasiveness of a regulatory scheme is not susceptible of precise qualification, See 1 P. Areeda and D. Turner, *Antitrust Law*, ¶224 (1978)." *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 83 (2d Cir. 1981). After giving cursory dismissal to an argument framed in terms of pervasiveness, the *Northeastern Tel. Co.* Court then stated, "The more focused inquiry is whether the industry is so extensively regulated that application of the antitrust laws would be incompatible with the regulatory framework, that is, whether immunity must be inferred to make the system work." *Northeastern Tel. Co. v. AT&T, supra*, at 83.

This is the proper inquiry to approach the accommodation of the two regulatory schemes. As stated this is the test which found its inception in *Silver v. New York Stock Ex-*

change, supra, at 357 and is the proper test for the instant case. See *United States v. National Association of Securities Dealers, Inc., supra*, at 734; *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378, 389 and 392 (1980). No Circuit Court case can be found which holds that the Communication's Act pervasively regulates the Bell System to the extent that ouster of the antitrust laws is necessary in order to make the regulatory scheme work. To the contrary, all of the cases cited *supra* at pp. 1-2, have rejected the argument that there has been such pervasive regulation of AT&T, or any of its affiliates, as to give rise to a repealer. There is no basis on the Petition's alternate ground for the Court to grant Certiorari.

IV.

The Core of the Relevant Inquiry Must Center Upon Legislative Intent.

The reason the Petitioners have lost all five Circuit Court cases on the implied immunity issue is simple. There is no legislative history whatsoever which reveals a legislative intent to repeal the antitrust laws. *National Gerimedical* case states the rule that the legislative intent "must be clear." In *National Gerimedical Hospital v. Blue Cross, supra*, at p. 389, the Court stated, "To be sure, where Congress did intend to repeal the antitrust laws, that intent governs. . . ." In making this statement, this Court cited *United States v. National Association of Securities Dealers, supra*, and *Gordon v. New York Stock Exchange, supra*, the two cases principally relied upon by the Petitioners. This Court has noted that *Gordon* and *NASD* soundly rest upon legislative intent analysis. On the question of legislative intent, this Court has also recently stated that the intent to repeal must be unambiguous and, in fact, must demonstrate

". . . some affirmative showing of an intention to repeal. . . ." *Morton v. Mancari*, 417 U.S. 540, 550 (1974); *Radsanower v. Touche Ross & Co.*, 426 U.S. 151, 164 (1976).

V.

The Decision Below Is Correct and No Writ Should Issue.

Recent decisions of the Court have disfavored implied immunities from the antitrust laws. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. Boulder, Colo.*, 50 USLW 4144 (January 13, 1982); *New York State Chiropractic Ass'n v. Pireno*, 50 USLW 4911 (June 28, 1982). Implied immunity of the Bell System has accordingly been examined and rejected time after time in the five Circuit cases cited as well as in numerous District Court cases. There is no reason, other than desperation, to suggest why this Court should examine this specific well-settled issue.

Secondly, Section 221(a) of the Communications Act contains an express antitrust exemption for telephone utilities. This Court has commented in similar instances,

> We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one. *California v. Federal Power Comm'n, supra*, at 485.

When unequivocal statutory exemptions shield specified conduct but fail to protect other conduct, this Court has concluded that Congress made a deliberate choice to exempt only the narrowly specified conduct, *Carnation v. Pacific Westbound Coal*, 383 U.S. 213, 220 (1966).

Thirdly, in the instant case, the named defendants include AT&T, Western Electric Company, and Bell Telephone Laboratories. The latter two companies, AT&T affiliates, are not regulated utilities as is defendant AT&T. Western

Electric merely is an equipment manufacturer and Bell Laboratories is a product development company. The complaint in the instant case alleges conspiracy to restrain trade among the three named defendants as well as among the numerous unnamed co-conspirators, which comprise the rest of the Bell operating companies. This Court recently stated that:

> . . . an exempt entity forfeits antitrust exemption by acting in concert with non-exempt parties . . . *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 202, 231 (1979).

By the same reasoning as in *Royal Drug*, the conspiracy in the instant case involving regulated companies with non-regulated companies likewise constitutes an independent ground to support a finding that none of the named defendants should be impliedly exempt from the antitrust laws.

Finally, the tariff in the instant case merely embodies the raw business judgment of the Bell system. In striking down the tariff in the *Carterfone* decision, the FCC stated the following as part of its rationale concerning the tariff:

> Furthermore, the tariff was the carrier's own. It was not prescribed by the Commission. It has remained subject to complaint into a finding that has been unlawful since its inception . . . But where the carrier itself initiates the right or practice, its lawfulness remains open, not only to a prospective finding, but also to a retroactive one . . . and it is not a bar to such a finding of past unlawfulness that the tariff has been permitted to remain in effect and has not, until now, been the subject of a determination as to its lawfulness. *Carterfone*, 13 FCC 2d 420, 425 (1968).

The post-*Carterfone* tariff, which required utility-provided connecting arrangements in regards to installations of customer-provided equipment, is in the background of the instant case. Like the tariff stricken down in *Carterfone*,

this later tariff has never been approved by the Commission. See particularly the dissenting opinion of FCC Commisioner Nicholas Johnson in the *Carterfone* decision on reconsideration, 15 FCC 2d 605, 614-617 (1968). Respondent draws the Court's attention to the FCC's *amicus curiae* brief in which the FCC confirms that the tariff in question in the instant case has not been approved by the Commission. The Commission pointed out in a footnote in this regard that in a 12-month period between September, 1974 through August, 1975 the FCC received 1,371 tariff filings totaling 11,491 pages. The footnote continued that the Commission could investigate only a small percentage of these filings. See FCC's *amicus curiae* brief, 62 FCC 2d 1102, 1115 (1975).

The many cases by this Court in which implied immunity has been denied have focused upon this business judgment aspect of the tariffs in question. In *Ottertail*, the Court commented in now a classic articulation:

> It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships. When these relationships are governed in the first instance by business judgment and not by regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. *Ottertail Power Co. v. United States, supra*, at 374, citing *United States v. Radio Corp. of America, supra*, involving Title III of the Communications Act.

Therefore, the "regulation" that the petitioners urge is, in actuality, no regulation at all, but merely tariffs which are filed with a regulatory body, the FCC.

Conclusion.

The five circuits are in harmony. Each one has refused to legislate by writing an implied exemption from antitrust jurisdiction into the Communications Act. No express immunity from the antitrust laws is granted by the Communications Act in regards to the conduct in question, though an express exemption for unrelated conduct is provided. Simply stated, the reason this Court should not entertain the requested Writ of Certiorari is that the Petitioners are asking this Court to legislate.

All cases decided by this Court which have found an implied immunity from antitrust jurisdiction have been coupled with a rationale and a finding of clear legislative intent to exempt the subject conduct. In the instant case the Petitioners have not even presented an argument that such a legislative intent exists, for none can be made. Therefore, they are compelled to omit the argument entirely rather than to expose its hollowness.

Customer-provided telephone equipment is a market which since *Carterfone* in 1968 has experienced innovation rivaling the computer industry. Technology, not regulatory fiat, has caused this market to mushroom.[5] Users of telephone equipment are now allowed to choose from a variety of suppliers. The FCC has specifically found that ". . . the competitive equipment marketplace has stimulated innovation . . ." and "has . . . afforded the public a wider range of terminal choices and other benefits . . ." *Primary Instrument Concept, supra*, at 1175.

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[5]See *Carter v. AT&T*, 365 F.2d 486, 490 (5th Cir. 1966); *Structure and Performance of the U.S. Communications Industry*, Berchardt (Division of Research Graduate School of Business Administration, Harvard University, Boston, 1970) at p. 3; "Scientific American"; *Microelectronics*, Vol. 27, No. 3 (Sept. 1977) at p. 63.

The Petition, moreover, does not present any concrete arguments or reasons why the Bell Companies should be given an implied immunity from competition. Vague concepts such as inconsistent standards and pervasiveness of the regulatory scheme lack necessary precision and, when scrutinized, clearly do not find any support on the facts of the instant case to suggest that the decisions of the five Circuit Courts denying immunity are incorrect.

In closing, Respondent draws the Court's attention, by Judicial Notice, to an irony of immense proportions now taking place. At this very time, the Bell System has announced in the public record of the United States District Court for the District of Columbia that it concedes antitrust court jurisdiction by its entering into a proposed consent decree in the *United States v. AT&T*. This case specifically involves antitrust violations of the customer-provided equipment market. Simultaneously, by the instant Petition the Bell System is asking this Court to hold it immune from the antitrust Court jurisdiction. This dilemma stems from a far greater inconsistency — lack of candor — than any of which Petitioners complain in the Petition.

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Respectfully submitted,

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